National Union of Bank Employees v Director General of Trade Unions & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–34–04 OF 2012(W)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ABDULL HAMID EMBONG, HASAN LAH AND JEFFREY TAN FCJJ
4 MARCH 2013

Civil Procedure — Judicial review — Application for — Filing of notice in Form 111B within 14 days when leave was granted — Appellant filed application 42 days later — Application for extension of time — Whether application for extension should be allowed — Whether non-compliance prejudicial — Whether application made well before date fixed for hearing of judicial review application — Rules of the High Court 1980 O 53 r 3(2)

In the High Court, the appellant had filed an ex parte application for judicial review under O 53 r 3(2) of the Rules of the High Court 1980 ('RHC') and leave was granted by the High Court on 13 May 2011. Order 53 r 4(1) of the RHC requires the appellant to file a notice in Form 111B within 14 days from the date when leave was granted but the appellant only filed Form 111B 42 days later. The appellant then filed an application for extension of time to file the same but the application was refused by the High Court. The High Court held that that the 14 days period for the appellant to file in Form 111B was not a mere technical rule and that it did not have an inbuilt for an extension of time unlike O 53 r 3 (6) of the RHC of the RHC. It was further held that in the absence of an express provision to allow for an extension of time under the particular provision, O 3 r 5 of the RHC might then be resorted to, subject to the exercise of court's discretion. The High Court found that there was no valid and sufficient ground in favour of granting the application. An appeal to the Court of Appeal also proved futile. In the present appeal against the decision of the Court of Appeal, the issues that arose for the court's determination were: whether a delay in filing Form 111B was fatal to hearing an application for judicial review when all relevant parties had been previously served with all cause papers, present and participated in the hearing and the date of hearing had been fixed in the presence of and with the consent of all parties concerned; and whether the fact that leave was objected to and argued inter partes by all parties, with all documents served on the parties and the hearing of the application fixed in the presence of all parties constituted an estoppel on the respondents to object to the late or even non-filing of a Form 111B.

Held, allowing the appeal with costs:

(1) Form 111B serves two main purposes namely to give notice to the

respondent named therein of the fact that leave for judicial review had been granted by the court and that the substantive application for that relief sought would be heard by the court on the date stated; and to give notice to the respondent that a copy of the statement and the affidavits in support were served upon the respondent. It was apparent that, Form ll IB was drawn up on the assumption that leave application was made ex parte and upon leave been granted, then the appellant would subsequently file and serve Form 111B upon the respondent. In the present case the Form 111B was filed 42 days after leave was granted by the court. Hence, the appellant was 28 days out of time, but it was filed well before the hearing of judicial review. In the circumstances, the non-compliance was not at all prejudicial to the respondents. The only factor against the appellant was the fact that there was some delay in making the application for extension of time. The application was made well before the date fixed for the hearing of judicial review application. Furthermore, the grant of extension of time by the court is one of discretion by virtue of O 3 r 5 of the RHC (see paras 25–27).

(2) The filing of Form 111B was nothing more than a mere formality. This was so, as the cause papers had been served on both respondents and the date of hearing of the judicial review application was fixed in the presence of all parties. Hence, the failure of the appellant to file the Form 111B within the stipulated time was no more than a mere technical non-compliance and had not caused any prejudice to the respondents (see para 28).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu telah memfailkan permohonan ex parte untuk semakan kehakiman di bawah A 53 k 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan izin diberikan oleh Mahkamah Tinggi pada 13 Mei 2011. Aturan 53 k 4(1) KMT memerlukan perayu untuk memfailkan notis dalam Borang 111B dalam masa 14 hari dari tarikh di mana izin diberikan tetapi perayu hanya memfailkan Borang 111B 42 hari kemudiannya. Perayu kemudiannya memfailkan permohonan untuk pelanjutan masa untuk memfailkan Borang tersebut tetapi permohonan ditolak oleh Mahkamah Tinggi. Mahkamah Tinggi memutuskan bahawa tempoh 14 hari untuk perayu memfailkan Borang 111B bukan hanya peraturan teknikal dan ia tidak wujud dalamnya untuk pelanjutan masa, berbeza dengan A 53 k 3 (6) KMT. Ia selanjutnya diputuskan bahawa dalam ketiadaan peruntukan nyata untuk membenarkan pelanjutan masa di bawah peruntukan tertentu, A 3 k 5 KMT mungkin dengan itu dirujuk, tertakluk kepada pelaksanaan budi bicara mahkamah. Mahkamah Tinggi mendapati bahawa tiada alasan yang sah dan mencukupi untuk memihak bagi membenarkan permohonan. Rayuan ke Mahkamah Rayuan juga membuktikan sia-sia. Dalam rayuan ini terhadap keputusan Mahkamah Rayuan, isu-isu yang berbangkit untuk penentuan

mahkamah adalah: sama ada kelewatan memfailkan Borang 111B adalah penting kepada pendengaran permohonan untuk semakan kehakiman apabila kesemua pihak relevan telah sebelumnya diserahkan dengan dokumen-dokumen sebab, hadir dan mengambil bahagian dalam pendengaran dan tarikh pendengaran telah ditetapkan dalam kehadiran dan dengan izin kesemua pihak berkenaan; dan sama ada fakta bahawa izin dibantah dan dihujahkan inter partes oleh kesemua pihak, dengan kesemua dokumen diserahkan kepada pihak-pihak dan pendengaran permohonan ditetapkan dalam kehadiran kesemua pihak membentuk estopel ke atas responden-responden untuk membantah kepada kelewatan memfailkan atau tidak memfailkan Borang 111B.

Diputuskan, membenarkan rayuan dengan kos:

(1) Borang 111B mempunyai dua tujuan utama iaitu untuk memberikan notis kepada responden yang dinamakan di dalamnya fakta bahawa izin untuk semakan kehakiman telah dibenarkan oleh mahkamah dan bahawa permohonan substantif untuk relief yang dipohon akan didengar oleh mahkamah pada tarikh yang dinyatakan; dan untuk memberi notis kepada responden bahawa salinan pernyataan dan afidavit menyokong diserahkan kepada responden. Adalah jelas bahawa Borang 111B dibuat atas anggapan bahawa permohonan izin dibuat ex parte dan selepas izin dibenarkan, perayu akan kemudiannya memfailkan dan menyerahkan Borang 111B kepada responden. Dalam kes ini Borang 111B difailkan 42 hari selepas izin dibenarkan oleh mahkamah. Maka, perayu adalah 28 hari di luar masa, tetapi ia difailkan sebelum pendengaran semakan kehakiman. Dalam keadaan ini, ketidakpatuhan bukan kesemuanya prejudis kepada responden-responden. Satu-satunya faktor terhadap perayu adalah fakta bahawa terdapat kelewatan dalam membuat permohonan untuk pelanjutan masa. Permohonan dibuat sebelum tarikh ditetapkan untuk pendengaran permohonan semakan kehakiman. Selanjutnya, pemberian pelanjutan masa oleh mahkamah adalah salah satu budi bicara mengikut A 3 k 5 KMT (lihat perenggan 25–27).

(2) Pemfailan Borang 111B adalah tidak lebih daripada formaliti semata-mata. Ini adalah kerana dokumen-dokumen sebab telah diserahkan ke atas kedua-dua responden dan tarikh pendengaran permohonan semakan kehakiman ditetapkan dalam kehadiran kesemua pihak. Maka. Kegagalan perayu memfailkan Borang 111B dalam masa yang ditetapkan adalah hanya ketidakpatuhan teknikal dan tidak menyaebabkan apa-apa prejudis kepada responden-responden (lihat perenggan 28).]

Notes

For a case on application for judicial review, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5113.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1; [2006] 3 CLJ 1, FC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)

Maxwell v Keun [1928] 1 KB 645, CA (refd)

Saeed U Khan v Lee Kok Hooi [2001] 5 MLJ 416, HC (refd)

Walker v Walker [1967] 1 WLR 327 (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 3 r 5, O 53 rr 3, 3(2), (6), 4, 4(1), 5, Form 111B

Trade Unions Act 1959 s 71A

Tommy Thomas (Alex De Silva and Adlan Hadi Mohamed Yusof with him) (Bodipalar Ponnudurai De Silva) for the appellant.

Nor Hisham bin Ismail (Aida Adhha bt Abu Bakar with him) (Attorney General's Chambers) for the first respondent.

GK Ganesan (KN Geetha and SK Mohan with him) (GK Ganesan) for the second respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

THE QUESTIONS/ISSUES POSED TO THE FEDERAL COURT

[1] This is an appeal against the decision of the Court of Appeal made on the 12 January 2012 in affirming the High Court's decision given on the 24 August 2011. The appeal arose from the High Court's decision in refusing the appellant's (the applicant in the High Court) application for an extension of time to file Form 111B as required under O 53 r 4(1) of the Rules of the High Court 1980 ('the RHC'). On the 19 April 2012, leave to appeal to the Federal Court was granted to the appellant on the following two questions:

(a) whether a delay in filing the notice of hearing of application for judicial review (Form 111B) pursuant to O 53 r 4 of the RHC is fatal to hearing an application for judicial review when:

(i) all relevant parties had been previously served with all cause papers;

(ii) all relevant parties were present and participated in the hearing for leave pursuant to O 53 r 3 of the RHC; and

(iii) the date of hearing of the application for judicial review was fixed in the presence of and with the consent of all parties concerned; and,

A (b) Whether the fact that leave was objected to and argued inter partes by all parties, with all documents served on the parties and the hearing of the application for judicial review fixed in the presence of all parties constitutes an estoppel on the respondents to object to the late or even non-filing of a Form 111B.

B

[2] This court had on the 4 March 2013 unanimously answered the first question in the negative and we now give our reasons for the same.

THE BACKGROUND FACTS OF THE CASE

C

[3] The appellant in the present appeal filed an ex parte application for judicial review under O 53 r 3(2) of the RHC which arose and resulted from the following facts.

D

[4] The appellant is the National Union of Bank Employees which also represents the non-executive employees employed by Maybank pursuant to the 16th collective agreement (article 6) dated 10 August 2010 entered into between the appellant and the Malayan Commercial Bank's Association ('MCBA'), in which Maybank is a member. On the 3 January 2011, the first E respondent, who is the Director General of Trade Union ('DGTU'), registered another union, which is an in-house union, known as 'Mayneu' with similar function as the appellant, representing Maybank's non-executive employees without consulting and seeking the view of the appellant. Mayneu is the second F respondent in the present appeal.

[5] By a letter of appeal dated 28 January 2011, the appellant wrote to the Human Resource Minister to review and cancel the registration of Mayneu pursuant to s 71A of the Trade Unions Act 1959. Whilst the appeal to the G Minister was still pending, the appellant filed an ex parte application for leave for judicial review dated 8 February 2012 in the High Court. The appellant viewed that the registration and the continued activities of Mayneu would cause great discontent amongst the appellant's members employed by Maybank who were already affiliated to and represented by the appellant under H the 16th collective agreement. The appellant also maintained that the establishment of Mayneu would have an adverse effect on industrial harmony in the industry.

THE PROCEEDINGS IN THE HIGH COURT

I

[6] At the hearing of the application for leave for judicial review on 27 April 2011, the representatives from the Attorney General's Chambers and counsel for the second respondent were present and both objected to the said application. Leave was however granted by the learned High Court judge on

13 May 2011. Order 53 r 4(1) of the RHC requires the appellant to file a notice in Form 111B within 14 days from the date when leave was granted. In the present case, the period of 14 days for filing Form 111B fell on 27 May 2011. Form 111B was only filed by the appellant on 24 June 2011 ie 42 days after leave was granted.

[7] As the filing of Form 111B was made beyond the prescribed time, the appellant then filed an application for extension of time to file the same through summons in chambers dated 21 July 2011. The application was refused by the learned High Court judge. The appellant then appealed to the Court of Appeal.

[8] The issue before the High Court was whether it ought to grant the extension of time to file Form 111B as applied for by the appellant. In the learned High Court judge's decision delivered on the 24 August 2011, he was of the view that the 14 days period for the appellant to file in Form 111B as required under O 53 r 4(1) of the RHC is not a mere technical rule. It does not have aninbuilt for an extension of time unlike O 53 r 3(6) of the RHC.

[9] The learned High Court judge went on to say that in the absence of an express provision to allow for an extension of time under the particular provision, then O 53 r 5 of the RHC may be resorted to, subject to the exercise of court's discretion. Upon reading the appellant's affidavit in support of its application for extension of time which was affirmed by one Melinda Marie D'Angelus, the learned High Court judge found that there was no valid and sufficient groundin favour of granting the application.

[10] The learned High Court judge referred to the Federal Court's case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329, and the learned judge had this to say in disallowing the appellant's application:

> Likewise, looking at *affidavit sokongan*, it only adverted to show what she had done with regards to the filing of the Form 111B. There was a reference to a certain clerk of the firm who apparently or purportedly was directed to do the necessary filing of the same in the court. Nevertheless, there is no affidavit coming from the said clerk to affirm what he had been directed to do and if so what he had done with regard to the said Form 111B. The portion of the transaction appears to this court to have been unsatisfactorily explained away. Was the 'missing' form due to the negligence of the court's staff or due to the negligence of the filing clerk? Whatever it is, no explanation was forthcoming in that regard from a reading of the 'affidavit in support' (encl 29) and as a result of that, this court is of the considered view that the averment by the applicant that the Form 111B had indeed been filed on the 25 May 2011, had not been satisfactorily established.

[11] The learned High Court judge further stated:

> … If that had been factually established as a matter of fact, such filing would have been within the stipulated time. But the deponent of the *affidavit sokongan*, Melinda Marie D'Angelus, had said that she only checked on the 24 June 2011 with the court registry, as to whether the said Form 111B had indeed been filed. When she was purportedly told that no such Form 111B was received from her firm, only then did she set about checking the paper trail.

THE PROCEEDINGS IN THE COURT OF APPEAL

[12] On the 12 January 2012, the Court of Appeal unanimously dismissed the appellant's appeal.

DECISION OF THE COURT OF APPEAL

[13] The reasons in dismissing the appeal are found in their broad grounds which are as follows:

(i) This appeal is against the exercise of discretion by the HCJ (High Court Judge).

(ii) We have considered the HCJ's written grounds carefully and submissions made by both parties today.

(iii) We find no reason to interfere with the HCJ's exercise of his judicial discretion to refuse an extension of time.

(iv) The HCJ found no acceptable explanation for the delay in filing the FORM 111B.

THE QUESTIONS OR ISSUES FOR OUR DETERMINATION

[14] Leave to appeal was granted by this court on two questions of law as set out in para I of this judgment. The question arose out of the delay by the appellant in filing Form 111B in a judicial review application. The first question is whether the delay in filing Form 111B is fatal to the application, and the second question is whether in the circumstances of this case, the respondents are estopped from objecting to the late filing or non-filing of Form 111B.

THE APPELLANT'S SUBMISSION

[15] The appellant contended that the delay and even the non-filing of Form 111B is not fatal to the application. Learned counsel for the appellant argued that the learned judges in the courts below (the High Court and the Court of Appeal) should have exercised their discretion judiciously and allowed the

appellant's application for extension of time to file Form 111B based on two grounds: (a) in the interest of justice to the parties especially the appellant; (b) no serious prejudice had been occasioned as a result of the delay in filing the said form.

[16] Counsel for the appellant further argued that the respondents' objection is on procedural technical non-compliance and should not have been allowed. The non-compliance in not filing the Form 111B could be remedied (curable) as the appellant did not completely disregard O 53 r 4 of the RHC since the purpose for which the said form was required to be filed had been fulfilled namely: (a) the cause papers for judicial review application had been served on both the respondents; (b) both the respondents participated in the said leave application; and (c) both the respondents agreed to the date of hearing of the application.

[17] The appellant also relied on O 1A of the RHC for this court to have regard to the justice of the case in interpreting the provisions of O 53 r 4 of the RHC. In the present case, they argued, it may cause a manifest injustice and great prejudice to the appellant if their application for the judicial review is dismissed on technical non-compliance. On the contrary, there is no injustice caused to the respondents arising from the delayin filing Form 111B.

[18] Premised on the above (particularly at para 17) the appellant contended,the fact that the leave application was contested inter partes and the respondents had access to the cause papers at the ex parte stage and was informed of the date of the hearingof the judicial review application, all that taken together constituted an estoppel on the respondents from raising objection for non-compliance of O 53 r 4 of the RHC.

THE RESPONDENTS' SUBMISSION

[19] As both the respondents in the present appeal have advanced common grounds, their submissions are considered together in this judgment.

[20] It is the respondents' contention that, the requirement forfiling and serving Form 111B within 14 days is a mandatory provision and as such time could not, for whatever reasons be extended.

[21] Counsel for the respondents further argued that the appellant's failure to comply with O 53 r 4 of the RHC rendered the court without jurisdiction to entertain the judicial review application. Form 111B has to be filed after leave has been granted by the court and it has to be served together with all the supporting documents to the respondents regardless whether they have been served earlier at the leave stage, and present during the hearing of the leave

application. This is a mandatory requirement and hence, the respondents could not, in the circumstances, be taken to have waived their rights by what had transpired in this case.

OUR DECISION

[22] The questions before the court are, first, whether the court has the power to extend time and if so should the court in the circumstances of the present case do so.

[23] On the first question the learned High Court judge correctly stated that even though there is no 'in built' provision to extend time, the extension of time is provided under O 3 r 5 of the RHC which is the general provision which confers upon the court the discretion to extend time. Therefore, the sole issue before us is whether the learned High Court judge had correctly exercised his discretion in the circumstances of this case.

[24] We think it is pertinent to consider the nature of the non-compliance and whether the non-compliance had seriously prejudiced the respondents' case. This is because the effect of a non-compliance may vary from case to case.

[25] In the present appeal, what calls for consideration, in the first place, is Form 111B itself. Form 111B serves two main purposes namely: (a) to give notice to the respondent named therein of the fact that leave for judicial review had been granted by the court and that the substantive application for that relief sought will be heard by the court on the date stated therein; and, (b) to give notice to the respondent that a copy of the statement and the affidavits in support are served upon the respondent.

[26] It is apparent that, Form 111B was drawn up on the assumption that leave application was made ex parte and upon leave been granted, then the appellant will subsequently file and serve Form 111B upon the respondent. In the present case the Form 111B was filed 42 days after leave was granted by the court. Hence, the appellant was 28 days out of time, but it was filed well before the hearing of judicial review which was scheduled on the 3 August 2011. But what needs to be given due consideration by the court in the present appeal is that, the leave application was heard inter partes and the cause papers were served on both respondents. Parties were then directed by the court to file written submissions. On the 13 May 2011, leave was granted and a hearing date was fixed in the presence of the parties. These, in our view, are important factors to be accorded due consideration by the court in considering the application for extension of time to file Form 111B. Therefore, in the circumstances, the non-compliance in our view, was not at all prejudicial to the respondents. The only factor against the appellant was the fact that there was

some delay in making the application for extension of time. Be that as it may, the application was made well before the date fixed for the hearing of judicial review application.

[27] The grant of extension of time by the court is one of discretion by virtue of O 3 r 5 of the RHC. The principle to be applied by the court is settled. In *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416, it was held that, the court should consider certain factors, when exercising its discretion to extend time, namely: (1) the delay in making an application; (2) whether or not there are cogent reasons for the litigant not to have made the application within the prescribed time; and, (3) the likelihood and degree of prejudice, as well as injustice to the opposite party should the court exercise its discretion. In the present appeal, the application for extension of time was made before the hearing of the judicial review application and the respondents were not prejudice by this application as they had been duly served with all the cause papers prior to the application itself. In exercising its discretion, the court must have regard to justice. This is in line with the provision in O 1A of the RHC (see *Maxwell v Keun* [1928] 1 KB 645; *Walker v Walker* [1967] 1 WLR 327).

[28] Generally, appellate courts are quite reluctant to interfere with the exercise of discretion by the courts below, (see the Federal Court's case of *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 CLJ 1). However, on the facts of the present appeal, we are of the view that,the filing of Form 111B is nothing more than a mere formality. This is so, as the cause papers had been served on both respondents and the date of hearing of the judicial review application was fixed in the presence of all parties. Hence, the failure of the appellant to file the Form 111B within the stipulated time was no more than a mere technical non-compliance and had not caused any prejudice to the respondents.

CONCLUSION

[29] For the reasons stated above, we would answer the first question in the negative, and with that, we do not propose to answer the second question. The appeal is accordingly allowed with costs in the cause. The appellant be granted an extension of time to file Form 111B until 24 June 2011 and the filing of Form 111B on the 24 June 2011 be deemed to have been properly filed.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor